# Zainuddin bin Mahmud v Public Prosecutor

HIGH COURT (KANGAR) — CRIMINAL APPEAL NO 41A-01 OF 2008
ZAMANI A RAHIM JC
16 JULY 2009

*Criminal Law — Penal Code — s 506 — Criminal intimidation — Appeal against conviction and sentence — Whether magistrate erred in concluding that prosecution successfully made out prima facie case — Whether prosecution failed to prove that complainant placed in a state of fear by accused — Whether defence cast reasonable doubt on prosecution's case*

*Evidence — Witness — Conflicting evidence — Whether complainant provided conflicting evidence in respect of weapon used by accused*

The accused, a former policeman was travelling in a car with his first wife ('complainant'), their daughter and step daughter when an argument broke out between him and his wife. The anger continued even after they reached home, and in the altercation the accused had slapped the complainant once on the left side of her face. The accused had then grabbed a Rambo-typed knife ('the knife') to stab the complainant but their daughter intercepted by standing in between him and the complainant to avert an untoward incident from happening. Thereafter, the accused had put the knife back into its sheath and retired to the bathroom. The complainant took that opportunity to make her way to a police station and lodge a police report against the accused ('the complaint'). The accused was charged with an offence of criminal intimidation under s 506 of the Penal Code. At the trial the prosecution proved through the direct oral evidence of the complainant that the accused had grabbed the knife to stab her. At the close of the prosecution's case the magistrate hearing the case found that the complainant's evidence was corroborated by the daughter's evidence and that it was established that the accused had criminally intimidated the complainant with injury when he threatened her with the knife. When the accused's defence was called, he sought to show that the complainant and her two daughters had conspired to take revenge against him for taking a second wife. At the end of the trial the accused was found guilty, convicted and sentenced to a fine of RM7,000 and in default to six months imprisonment. This was the accused's appeal against that conviction and sentence. In his appeal the accused submitted that the magistrate had erred in concluding that the prosecution had successfully made out a prima facie case against the accused when the prosecution had failed to prove that the complainant was placed in a state of fear by the

accused. The accused further submitted that the complainant had given conflicting evidence when she referred to the weapon used by the accused to intimidate her as 'a knife' in her testimony in court and as 'a parang' in her police report and in the medical report.

**Held**, dismissing the appeal:

(1) Based on the evidence before him, the magistrate had correctly found that the accused possessed all the necessary intent to cause alarm to the complainant. Further the evidence of the complainant was sufficiently corroborated by her daughters. As such, the prosecution had established all the essential elements of the offence under s 506 of the Penal Code (see para 15).

(2) The accused's contention that the complainant had provided conflicting evidence when she referred to the weapon as 'a parang' in the police and medical reports was misconceived and had no merit. There was no violent conflict in evidence in respect of the weapon used by the accused. It was a matter of using different names over exactly the same thing. It did not detract from the finding of fact that the accused was wielding a weapon at close range to threaten the complainant. In any case, both a knife and a parang are weapons of the same genus (see paras 26–28).

(3) At the end of the day the prosecution had successfully proven its case beyond a reasonable doubt because the defence had not cast any doubt on it. The magistrate who had seen the prosecution witnesses found them credible and there was no evidence of bad faith or conspiracy among the complainant and her daughters to make false accusations against the accused. Thus, there was no reason for this court to interfere with such findings of fact based on the credibility of the witnesses (see paras 30 & 32).

(4) There was no reason to interfere with the conviction or sentence imposed by the magistrate, as he did not transgress from any established legal principles or guidelines (see para 37).

**[Bahasa Malaysia summary**

Tertuduh, bekas pegawai polis sedang memandu kereta bersama isteri pertamanya, anak perempuan mereka dan anak perempuan tirinya apabila suatu pergaduhan berlaku diantaranya dan isteri. Kemarahan berterusan sehinggalah mereka sampai ke rumah, dan dalam perbalahan itu, tertuduh menampar isterinya sekali di bahagian kiri mukanya. Tertuduh kemudiannya menyambar pisau jenis Rambo ('pisau tersebut') untuk menikam isterinya tetapi anak perempuan mereka menghalang dengan berdiri antara tertuduh dan isterinya untuk mengelakkan sebarang kejadian yang tidak diingini. Kemudiannya, tertuduh memasukkan semula pisau tersebut ke dalam

A sarungnya dan masuk ke bilik mandi. Isterinya mengambil peluang tersebut dan pergi ke balai polis untuk membuat laporan terhadap tertuduh ('aduan tersebut'). Tertuduh dituduh dengan kesalahan intimidasi jenayah di bawah s 506 Kanun Keseksaan. Semasa perbicaraan, pihak pendakwaan telah membuktikan menerusi keterangan lisan terus pengadu bahawa tertuduh
B menyambar pisau tersebut untuk menikamnya. Pada penutupan kes pendakwaan, majistret yang mendengar kes tersebut memutuskan bahawa tertuduh telah melakukan intimidasi jenayah terhadap pengadu untuk mencederakannya apabila dia mengugut isterinya dengan pisau tersebut. Apabila tertuduh dipanggil untuk membela diri, dia memohon untuk
C membuktikan bahawa pengadu dan kedua-dua anak perempuannya berkonspirasi untuk membalas dendam kerana dia telah berkahwin satu lagi. Pada akhir perbicaraan, tertuduh didapati bersalah, disabitkan dan dihukum denda sebanyak RM7,000 dan jika gagal, dihukum penjara enam bulan. Ini
D merupakan rayuan tertuduh terhadap sabitan dan hukuman. Dalam rayuannya, tertuduh berhujah bahawa majistret telah khilaf apabila menyimpulkan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap tertuduh apabila pihak pendakwaan gagal membuktikan bahawa pengadu ketakutan disebabkan oleh tertuduh. Tertuduh seterusnya
E menyatakan bahawa pengadu telah memberikan keterangan yang bercanggah apabila dia merujuk kepada senjata yang digunakan tertuduh untuk menakut-nakutkannya sebagai 'sebilah pisau' dalam keterangannya di mahkamah dan sebagai 'sebilah parang' dalam laporan polis dan laporan perubatan.

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**Diputuskan**, menolak rayuan:

(1) Berdasarkan keterangan di hadapannya, majistret telah secara betul membuat penemuan bahawa tertuduh mempunyai kesemua niat yang
G perlu untuk menyebabkan kecederaan kepada pengadu isteri. Selanjutnya, keterangan pengadu disokong sewajarnya oleh anak-anak perempuannya. Oleh itu, pihak pendakwaan telah membuktikan kesemua elemen-elemen kesalahan di bawah s 506 Kanun Keseksaan (lihat perenggan 15).

H (2) Hujahan tertuduh bahawa pengadu isteri telah memberikan keterangan yang bertentangan apabila dia merujuk kepada senjata tersebut sebagai parang di dalam laporan-laporan polis dan perubatannya telah disalah tafsir dan tiada merit. Tidak ada konflik keterangan yang besar berkaitan dengan senjata yang digunakan oleh tertuduh. Ia adalah
I penggunaan nama yang lain untuk benda yang sama. Ia tidak menyimpang daripada penemuan fakta bahawa tertuduh mengacu senjata dari jarak dekat untuk mengugut pengadu. Walau bagaimanapun, kedua-duanya, pisau dan parang adalah senjata dari genus yang sama (lihat perenggan 26–28).

(3) Kesimpulannya pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan yang munasabah kerana pihak pembelaan tidak menimbulkan sebarang keraguan ke atasnya. Majistret yang telah melihat saksi-saksi pendakwaan dan mendapati mereka boleh dipercayai dan tidak ada keterangan dengan niat jahat atau konspirasi oleh pengadu dan anak-anak perempuannya untuk melemparkan tuduhan salah terhadap tertuduh. Oleh itu, tidak ada sebab untuk mahkamah ini campur tangan dengan dapatan fakta yang sedemikian berdasarkan kebolehpercayaan saksi-saksi (lihat perenggan 30 & 32).

(4) Tidak ada alasan untuk campur tangan dengan sabitan dan hukuman yang dikenakan oleh majistret kerana beliau tidak melanggar apa-apa prinsip atau peraturan undang-undang yang sudah mantap (lihat perenggan 37).]

**Notes**

For cases on conflicting evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2661–2663.

For cases on s 506 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2000–2002.

**Cases referred to**

*Ah Mee v PP* [1967] 1 MLJ 220, FC (refd)

*Aparav a/l Sathiah v PP* [1996] MLJU 555; [1997] 2 CLJ Supp 391, HC (refd)

*Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83, FC (refd)

*Lee Yoke Choong v PP* [1964] MLJ 138, HC (refd)

*Pavone v PP* [1986] 1 MLJ 72, HC (refd)

*People's Insurance Co (M) Bhd, The v Ting Tiew Kiong* [2007] 5 MLJ 624; [2007] 5 CLJ 225, CA (folld)

*PP v Lee Eng Kooi* [1993] 2 MLJ 322; [1993] 2 CLJ 534, HC (folld)

*Sinnasamy a/l Kaliappan v PP* [2005] 7 MLJ 570; [2005] 1 LNS 293, HC (refd)

*Tan Ah Kow v PP* [1996] MLJU 79; [1996] 3 CLJ 463, HC (not folld)

*Tng Tien Chai & Anor v PP* [1995] MLJU 392; [1995] 3 CLJ 292, HC (distd)

**Legislation referred to**

Criminal Procedure Code s 107

Evidence Act 1950 ss 91, 92

Penal Code ss 503, 506

*Zuhair bin Ahmad Zakuan (Jamil Mohamed Shafie & Associates) for the appellant.*

*Azman bin Abu Hassan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Zamani A Rahim JC:**

**[1]** The accused, a former policeman, was indicted with an offence of criminal intimidation under s 506 of the Penal Code, which read as follows:

> Bahawa kamu pada 13.11.2006 antara jam lebih kurang 1.00 pagi bertempat di dalam sebuah rumah No 64, Perumahan Polis Seriab, Kangar, di dalam Daerah Kangar, di dalam Negeri Perlis, telah melakukan ugutan jenayah kepada seorang bernama Siti Norfarahin binti Abdullah, No Passport: J3351346 dan mengacukan sebilah pisau kepadanya dengan niat hendak menyebabkan ketakutan yang mendatangkan kecederaan atau kematian kepadanya. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 506 Kanun Keseksaan.

**[2]** The accused defence was called. At the end of the trial, he was found guilty, convicted and sentenced to a fine of RM7,000 and in default six months imprisonment. The fine was paid.

**[3]** Dissatisfied with the conviction and sentence, the accused appealed to this court.

**[4]** The prosecution's case is as follows. The accused was a policeman. He had since left the service. He had two wives. His first wife was Siti Norfarahin bt Abdullah, SP2. And his second wife is Siti Norasikin bt Ali, SD2. The accused has two daughters — his own daughter, Siti Shairatul Shima bt Zainuddin SP5 and a step daughter, Siti Hazierah bt Abdullah, SP3.

**[5]** The accused, his first wife, SP2, and the two daughters, SP3 and SP5 lived at No 64, Perumahan Polis Seriab, Kangar. SP2 operated a food stall at Kuala Perlis.

**[6]** On 13 January 2006, at about 1am, SP2, SP3 and SP5 were returning home in a car driven by the accused, after having completed the days work at their food stall at Kuala Perlis. While traveling, an argument broke between SP2 and the accused. As always the case of polygamous marriage, the argument was a result of SP2's jealousy. SP2 was jealous as the accused had sped up the car to reach home quickly and thereafter to proceed to his second wife's house.

**[7]** The argument continued upon reaching home. In anger the accused kicked SP3 but missed her. SP3 went to the kitchen. The accused then directed his anger to SP2. He slapped her once on the left side of the face. She suffered soft tissue injury (see the medical report, P10). As a result of the slap,

SP2 fell down and a grapple ensued. The accused then grabbed a knife from the top of an aquarium and threatened to stab SP2. On seeing this, SP5 came to her mother's rescue.

**[8]** SP5 rushed to stand in between the accused and SP2. SP5 was shielding SP2. SP5 pushed SP2 backward to avert an untoward incident from happening. Thereafter, the accused may have presumably cooled down and he put back the knife in its sheath and went to the bathroom.

**[9]** When the accused was temporarily out of sight, SP2 and her daughters sneaked out from the house and went to Kangar police station where she lodged a police report vide Kangar Report No 902/06. In the course of police investigation, the accused surrendered the knife, P6A together with its sheath, P6B to the investigating officer, Insp Roshaya bt Mat Isa, SP6. In the course of investigation, a copy of the photograph showing P6A and P6B was taken. It was marked as P2 (see p 147 of appeal record).

**[10]** As stated at the beginning of this judgment, the accused was charged with an offence of criminal intimidation under s 506 of the Penal Code. Criminal intimidation is defined in s 503 as follows:

> Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

**[11]** The essential ingredients of the offence of criminal intimidation under s 503 to be proved by the prosecution are:

(a) Threatening another (the complainant) with any injury to his (her) person (first ingredient); and

(b) Intent to cause alarm to that person (the complainant) (second ingredient).
See *Sinnasamy a/l Kaliappan v Public Prosecutor* [2005] 7 MLJ 570; [2005] 1 LNS 293.

**[12]** The first ingredient was adduced through the direct oral evidence of the complainant, SP2. She said in the altercation the accused had slapped her. She retaliated. The accused then grabbed a rambo-typed knife to stab her. Her daughter, SP5 came to intercept by standing in between the accused and SP2. The evidence of SP2 was corroborated by SP5's evidence. In cross-examination, both SP2 and SP5 denied to counsel's suggestion that the

A accused never threatened SP2 with a parang or knife. In other words, their evidence that the accused had threatened SP2 was never shakened.

**[13]** As regard the second ingredient, learned counsel submitted that SP2 was not frightened or she was not placed in a state of fear by the accused. B Though SP5 was frightened and shocked, her feeling could not be exported or imputed to SP2. As the prosecution had failed to prove this ingredient, learned counsel contended that the learned magistrate was therefore in error to conclude that the prosecution had successfully made out a prima facie case against the accused. Learned counsel appeared to have emphasised on the C feeling or effect on SP2, instead the intent of the accused to cause alarm. In *Lee Yoke Choong v Public Prosecutor* [1964] MLJ 138, among the mitigating factors put forward, inter alia, that the complainant was not in fact frightened and the accused never threatened to carry out the threat personally. To this, D Ong J said:

> I consider all these grounds are beside the point. The offence of criminal intimidation lies in the intent behind a threat, not its effect.

E **[14]** In the case of *Sinnasamy a/l Kaliappan*, in an appeal by the accused against the decision of the learned magistrate who had found him guilty and convicted with an offence under s 506, Low Hop Bing J had this to say:

F > The second ingredient ie the accused's intent by its very nature cannot be proved by direct evidence but may be inferred from all the circumstances of the case. In the instant appeal, it is clear to me that the learned magistrate has made the correct inference that the accused had the necessary intent to cause alarm to the complainant.

G **[15]** In the instant case, I am satisfied that the learned magistrate had correctly found, based on the evidence before him, that the accused possessed all the necessary intent to cause alarm to SP2. The evidence of SP2 was sufficiently corroborated by the evidence of SP5 and SP3. The learned H magistrate had therefore came to a correct decision that a prima facie case had been made out and called upon the accused to enter his defence as the prosecution had established all the essential elements of the offence under s 506.

I **[16]** Learned counsel also submitted that there was a violent conflict in the evidence of SP2 as regard the weapon used by the accused. This appeared to be the defence strong point. In her testimony in court, SP2 said it was a knife, whilst in her police report, P3 and the medical report, P10, both stated the weapon was a parang. Citing the Federal Court case of *Ah Mee v Public*

*Prosecutor* [1967] 1 MLJ 220 learned counsel argued in his written submission dated 22 April 2009 and repeated in his reply dated 22 June 2009 as follows.

> Oleh yang demikian, dalam kes ini laporan SP2 iaitu P3 dan dalam Lapuran Perubatan P10, telah dicatit perkataan 'parang' bukan 'pisau'. Ini menunjukkan SP2 telah membuat satu laporan palsu dan tohmahan palsu kepada Doktor yang Perayu telah ugut SP2 dengan sebilah parang. Parang disebut dalam dokumen yang telah dimasukkan sebagai P3 dan P10, dan kedua-duanya adalah keterangan bertulis yang tidak boleh ditukar kandungan keterangan dokumentari dengan keterangan lisan. Maka keterangan SP2 telah di 'contradict' oleh P10 dan juga oleh P3, jadi terdapat satu 'violent conflict of evidence'.

**[17]** Learned counsel's contention that 'SP2 telah membuat satu laporan palsu dan tohmahan palsu kepada doktor' is misconceived. There was no evidence of falsity of any sort. There was no evidence that SP2 had made false allegation (tohmahan palsu) against the doctor. What learned counsel meant was presumably the word 'parang' stated in the medical report, P10 was narrated to the doctor by SP2 and this was false. He went on to submit that 'keterangan SP2 telah di 'contradict' oleh P10 dan juga P3, jadi terdapat satu 'violent conflict of evidence' is another wrong statement of the law within the principle propounded by Ong Hock Thye FJ in *Ah Mee*'s case, which formed the basis of learned counsel argument.

**[18]** As I understand it, a police report contains information relating to the commission of an offence which is required under s 107 of the Criminal Procedure Code to be reduced to the form of a document. See s 91 of the Evidence Act 1950. And by virtue of s 92 of the same Act, no parole evidence may be admitted seeking to contradict or vary any written statement contained in the document under s 91. In *Ah Mee*'s case, among the grounds of setting aside the appellant's conviction, the trial court had admitted material evidence which was inadmissible. The complainant in a rape case clearly gave the appellant's car number as *M 7354* in her police report. But the actual number of the appellant's car was *M 6049*. The registration number M 7354 belonged to a motorised grass-cutter which ceased to exist since 1957. The trial judge had admitted the complainant's explanation that it was an honest mistake, that is, the complainant was uncertain when she was asked by the police to give the number of the vehicle involved. Ong Hock Thye FJ who delivered the judgment said that s 91 and s 92 were equally applicable, not only to the civil proceedings but also the criminal proceedings. His Lordship said:

> *Section 91* of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically state that 'in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such matter

A except the document itself. The report was information relating to the commission of an offence which 'shall be reduced to writing' pursuant to s 107 of the Criminal Procedure Code (Cap 6) and s 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing.

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**[19]** The above principle was followed by Edgar Joseph J (as he then was) in *Pavone v Public Prosecutor* [1986] 1 MLJ 72. For a diametrically opposing view, please refer to the judgment of Abdul Kadir bin Musa JC (as he then was) in *Tng Tien Chai & Anor v Public Prosecutor* [1995] MLJU 392; [1995] C 3 CLJ 292.

**[20]** The application of s 91 and s 92 may be exemplified in the case of *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322; [1993] 2 CLJ 534. The facts are as follows. In the trial, ASP Sat Pal Jain and Insp Tan Boon Hooi D gave evidence that the firearm which formed the subject matter of the charge was found in a bag *held* by the accused. In the police report made immediately after the accused's arrest showed that the firearm was found in the *house* occupied by the accused, and not in the bag held by the accused.

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**[21]** Whilst the trial was in progress, the prosecution made an application to recall ASP Sat Pal Jain to remedy and explain the discrepancies in his evidence in court and the police report. The prosecution's application as a matter of course was strongly objected by the defence. The defence objection F was upheld on the ground, inter alia, the police report was a written document within s 91 and s 92 and went on to exclude the admission of parole evidence to vary the contents or terms in the police report.

**[22]** The application of s 91 and s 92 to the medical report may be seen in G the case of *Tan Ah Kow v Public Prosecutor* [1996] MLJU 79; [1996] 3 CLJ 463.

**[23]** In this case, the twin provisions of s 91 and s 92 of the Evidence Act have no application. There is no violent conflict in evidence of SP2 in respect H of the weapon used by the accused. It is a matter of using a slightly different names over exactly the same thing. In his oral evidence, SP2 described the knife as follows:

> Pisau itu pisau jenis rambo. Pisau itu agak panjang, lebih panjang dari pembaris I yang ada dalam mahkamah. Pisau itu tidak ada warna cuma karat.

(p 19 of the appeal record).

**[24]** SP5 described the knife in the following words:

> Pisau diambil di atas akuarium dalam gambar. Pisau itu ada gigi sikit di bahagian atas dan juga berkarat. Panjang pisau itu lebih kurang 2 jengkal.
>
> (p 42 of the appeal record).

**[25]** SP3 gave the description of the knife as follows:

> Pisau itu macam bergerigi sikit. Pisau itu ada dalam sarung. Panjang agak seperti kertas angkat sumpah ini.
>
> MH: kertas angkat sumpah di dalam mahkamah.
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> (p 28 of the appeal record).

**[26]** The knife and its sheath were produced at the trial marked P6A and P6B respectively. It was apparent that the knife, P6A matched some of the descriptions given by prosecution witnesses, SP2, SP3 and SP5. Though in her testimony SP2 referred to the weapon as knife and in her police report as *parang*, whereas SP5 and SP3 in their testimonies referred to as knife, it did not detract from the fact that the weapon was P6A. This was because ultimately SP2, SP3 and SP5 positively identified P6A as being the weapon used by the accused to threaten SP2. It is therefore, to some people, P6A is called interchangeably as *parang* or knife and to some others, it is called a knife. The knife and *parang* are weapons of the same genus. Both have blades. The former the blade is ordinarily narrow and small in size, whilst the latter the blade is long and broad. The latter also has a holder which can be used to grip it firmly. In the course of this appeal, I have the opportunity to view the photograph, P2 which clearly showed P6A and P6B. And to be honest with, I, myself is unsure what to call it. Given the choice, I would call it a rambo knife because its features are a fusion of a *parang* and a bigger version of a scout knife.

**[27]** For completeness of argument, assuming that the weapon is not recovered, it does not ipso facto detract from the finding of fact that the accused was wielding a weapon at close range and using it to threaten SP2. In *Sinnasamy a/l Kaliappan*'s case, Low Hop Bing J said:

> The absence of the *parang* does not ipso facto detract from the finding of fact that the accused was holding and using it to hit the metal gate of the house, thereby leaving undisputed and obvious tell-tale marks were corroborated by the direct oral evidence adduced through other prosecution witnesses under s 60(1)(a) of the Evidence Act 1950.

**[28]** At the end of the day, learned counsel's contention on the issue of *parang* or knife has no merit.

**[29]** Learned counsel also alleged that the learned magistrate had failed to consider the evidence which were favourable to the accused and also failed to take into account the contradiction of SP2's evidence which was given on oath and her police report, P3 (see para 3.2 of the memorandum of appeal). And further learned counsel alleged that the learned magistrate had erred in law and in fact to convict and passed a sentence on the accused and to conclude that the prosecution had proved its case beyond reasonable doubt at the end of the defence case (see para 3.1 of the memorandum of appeal).

**[30]** At the end of the defence case, the defence had not cast any reasonable doubt on the truth of the prosecution's case. Therefore, the prosecution's case remained strong and the prosecution had successfully proved its case beyond reasonable doubt. In his defence the accused's averments that SP2 had hit him on his head with an alluminium cake container and the allegation that the knife and its sheath, P6A and P6B were not taken into the house but always kept it in the boot of his car used for fishing were not accepted by the learned magistrate. The learned magistrate was of the view that the accused's averments in this respect was an afterthought as the prosecution witnesses, SP2, SP3 and SP5 were never asked or challenged about them when they gave evidence during the prosecution's case.

**[31]** In his defence too, the accused sought to show the motive that SP2, SP3 and SP5 had conspired to fix or took revenge against him so that he would loose his job for marrying the second wife, SD2. There was not a slightest truth in the allegation. The learned magistrate put it in this way:

> Pihak pembelaan juga telah memanggil saksi pembelaan ke 2 (SD2) untuk membuktikan motif SP2 yang ingin membalas dendam dan mengenakan perayu sehingga dia hilang kerja. Walaupun isu motif ini dibangkitkan, tetapi mahkamah mendapati bahawa motif ini tidak memberi sebarang kesan untuk pihak pembelaan membuktikan bahawa wujudnya konpirasi, tuduhan palsu atau mereka-reka cerita dari pihak pendakwaan dan juga pengadu. Mahkamah juga telah melihat kredibiliti saksi-saksi pendakwaan dan kebolehpercayaan semasa memberi keterangan. Maka ini menunjukkan bahawa kes pendakwaan adalah kuat dan kukuh untuk menafikan niat jahat atau konspirasi SP2, SP3 dan SP5 untuk membuat tuduhan palsu.
>
> Maka, berdasarkan di atas alasan-alasan di atas mahkamah mendapati bahawa pihak pendakwa telah berjaya membuktikan kesnya melampaui keraguan munasabah dan pihak pendakwaan gagal untuk menimbulkan keraguan kepada kes pendakwaan.

(pp 141–142 of the appeal record).

**[32]** As stated above, the learned magistrate had seen prosecution witnesses while giving evidence. He found their evidence to be credible. They were witnesses of truth. The prosecution case was overwhelmingly strong and there

was no evidence of bad faith or conspiracy among SP2, SP3 and SP5 to make false accusation against the accused. Bear in mind that SP5 is the accused's own biological daughter — his own flesh and blood. It was highly improbable for her to concoct the story. With the findings of facts based on credibility of witnesses, I am sitting in the appellate court, should be slow to interfere with such findings unless the findings is clearly wrong, which is not in this case.

**[33]** In the case of *Aparav a/l Sathiah v Public Prosecutor* [1996] MLJU 555; [1997] 2 CLJ Supp 391 Abdul Wahab Patail J at p 395 (CLJ) said:

> Generally, the decision as to the credibility of witness properly belongs to the trial judge. It is a matter of the trial judge's personal observation as the credibility of witness's testimony is not just a matter of clear unequivocal statements in evidence but also how fluently, willingly, unhesitatingly and candidly the witness answers questions. The appellate court, not having seen or heard such a witness, is at a disadvantage and, therefore, has to rely on the findings of the trial judge unless his conclusions are obviously against the weight of the evidence.

**[34]** In the Court of Appeal case of *The People's Insurance Co (M) Bhd v Ting Tiew Kiong* [2007] 5 MLJ 624; [2007] 5 CLJ 225 it was held:

> The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that these findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge who has been them and judged their honesty and accuracy (see Federal Court case of *Chine Airlines Ltd v Malta Sir Corporation Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). We adopt the same in deciding this appeal.

**[35]** I wholeheartedly approach the same in the instant appeal.

**[36]** Now, I come to the question of sentence. Sentencing is a matter of a trial court discretion. In order to interfere with the sentence imposed, the appellate court must be convinced that the trial judge or magistrate had erred in applying the correct principle of sentencing or had embarked on some unauthorised or extraneous exercise of discretion. In the Federal Court case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, Raja Azlan Shah Ag LP (as His Highness was) said:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial

A discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may some times reach different conclusions (see *Jamieson v Jamieson*). It is for the reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences, whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion …

**[37]** In the final analysis, I do not propose to disturb the decision made by the learned magistrate as I found that he did not transgress any established legal principles and guidelines which warranted my intervention, both on conviction and sentence. I hereby confirmed the fine of RM7,000 in default six months imprisonment imposed by the learned magistrate.

*Appeal dismissed.*

Reported by Kohila Nesan